INDEX

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 846

SEABOARD SURETY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25) is reported at 67 F. Supp. 969.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1946 (R. 30). The petition for a writ of certiorari was filed on January 3, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, where a construction contractor with the United States has made a general assignment

for benefit of creditors, the United States is entitled, under R. S. 3466, to use the balance retained under the contract to liquidate the Social Security and capital stock tax indebtedness to it of such contractor as against the claim for such balance of the contractor's surety who has made expenditures in accordance with the contractor's payment and performance bonds.

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, pp. 6–7.

STATEMENT

On July 14, 1936, Peterson Construction Company (hereinafter called the contractor) entered into a contract with the United States for the performance of certain work on the All-American Canal System (R. 20). Petitioner became surety on the payment and performance bonds furnished to United States pursuant to the Miller Act (Act of August 24, 1935, Appendix, pp. 6–7; R. 20–21).[1]

Shortly prior to July 28, 1937, the contractor became financially unable to pay certain labor and material costs under the contract, and on that date was declared in default under the terms of the contract by the United States (R. 21, 23). At the time of the final default, payments of $52,-

[1] On the same day, the contractor assigned to the surety amounts due under the contract in the event that the contractor defaulted and the surety became liable under the bonds (R. 23).

557.35 had been made by the United States under the contract, $2,800 of the amount earned by the contractor being retained (R. 21). Petitioner completed the contract by performance of work of the contract value of $903.86 (R. 21). Petitioner had also expended a net sum of $5,771 under the payment bond for the satisfaction of labor and material claims under the contract (R. 21, 23–24).

Petitioner submitted a claim to the United States for the amount of $3,703.86, consisting of the $2,800 retained by the United States under the contract and the value of the completion work performed after the contractor's default (R. 21). By a settlement dated February 9, 1939, the General Accounting Office authorized payment to petitioner of $1,841.24, applying the balance of $1,-862.62 to the liquidation of Social Security and capital stock tax indebtedness owed by the contractor to the United States (R. 21, 22). Upon petitioner's protest, the Comptroller General reviewed the settlement and affirmed it on May 29, 1939 (R. 22). The undisputed amount was paid to petitioner (R. 22), and this suit was instituted in the Court of Claims to recover the sum of $1,862.62 retained by the United States and applied in liquidation of the contractor's tax indebtedness.

In addition to the facts set forth above, the Court of Claims also found that the contractor had made a general assignment for the benefit

of creditors on May 10, 1938 (R. 24).[2] The court held that, upon the formal insolvency of the contractor, a statutory priority under R. S. 3466 (Appendix, p. 6) arose in favor of the United States with regard to the contractor's tax indebtedness (R. 27); and that neither by virtue of the assignment of July 21, 1936 or any other circumstance of the case did petitioner obtain a superior right for a lien (R. 27–29). Accordingly, the use by the United States of part of the retained contract balance to liquidate the contractor's tax indebtedness was sustained and the complaint was dismissed (R. 30).

ARGUMENT

In sustaining the statutory priority of the United States herein, the Court of Claims specifically followed its own recent decision on precisely the same question in *Dewey Schmoll* v. *United States,* 105 C. Cls. 415, as to which this Court denied an application for certiorari on October 14, 1946 (No. 244, this Term). The narrow issue here involved is entirely distinct from the broad question presently before this Court in the Government's petition for certiorari in *United States* v. *Munsey Trust Company,* No. 847, peti-

[2] A claim was filed by the United States with the trustees named in this assignment for benefit of creditors but was withdrawn when, on February 9, 1939, the contractor's tax indebtedness was liquidated by application of the contract balance held by the Government (R. 24).

tion filed January 3, 1947. The *Munsey Trust* case raises the set-off rights of the United States in the absence of formal insolvency in the contractor-debtor and does not involve the situation here, namely, the statutory priority of the United States under R. S. 3466 where formal insolvency exists. Nor can petitioner validly claim any identity between the issue here and the question, which this Court has specifically left open, with regard to a specific and perfected lien urged in opposition to the statutory priority of the United States under R. S. 3466 in an insolvent debtor's estate. See *Illinois ex rel. Gordon* v. *Campbell,* No. 35, this Term, decided December 23, 1946. For the reasons set forth in the Government's brief in opposition in the *Schmoll* case, we respectfully submit that there is no need for review herein.

CONCLUSION

The decision below is clearly correct and there is no conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
SAMUEL D. SLADE,
JANE A. PARKER,
Attorneys.

FEBRUARY 1947

APPENDIX

1. Rev. Stat. 3466, 31 U. S. C. 191, provides as follows:

> *Priority established.*—Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

2. Section 1 of the Miller Act (Act of August 24, 1935, c. 642), 49 Stat. 793, 40 U. S. C. 270a, provides in part as follows:

> (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":
>
> (1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as

he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

U. S. GOVERNMENT PRINTING OFFICE: 1947